The Democratic Character of Judicial Review

Directions: Read the article *"The Democratic Character of Judicial Review"* by Eugene Rostow. Then write down three sentences of the three most important points Rostow wants the reader to know/understand about Judicial Review. You must find evidence found in the text to support your statements. Make sure to label the text with #1, #2 & #3 in the spots that support your statements.

1.

2.

3.

Finally write down a sentence that summarizes the article using the following terms

Judicial Review, Democratic, undemocratic, federalist papers, separation of powers, independent judiciary, Supreme Court.

Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community. Though I trust the friends of the proposed Constitution will never concur with its enemies in questioning that fundamental principle of republican government which admits the right of the people to alter or abolish the established Constitution whenever they find it inconsistent with their happiness; yet it is not to be inferred from this principle that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents incompatible with the provisions in the existing Constitution would, on that account, be justifiable in a violation of those provisions; or that the courts would be under a greater obligation to connive at infractions in this shape than when they had proceeded wholly from the cabals of the representative body. Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge of their sentiments, can warrant their representatives in a departure from it prior to such an act. But it is easy to see that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community.

But it is not with a view to infractions of the Constitution only that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of an iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled, by the very motives of the injustice they meditate, to qualify their attempts. This is a circumstance calculated to have more influence upon the character of our governments than but few may be aware of. The benefits of the integrity and moderation of the judiciary have already been felt in more States than one; and though they may have displeased those whose sinister expectations they may have

disappointed, they must have commanded the esteem and applause of all the virtuous and disinterested. Considerate men of every description ought to prize whatever will tend to beget or fortify that temper in the courts; as no man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be a gainer today. And every man must now feel that the inevitable tendency of such a spirit is to sap the foundations of public and private confidence and to introduce in its stead universal distrust and distress. . . .

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EUGENE ROSTOW

The Democratic Character of Judicial Review

Written nearly half a century ago, this classic article by legal scholar Eugene Rostow remains the most important analysis written on the theory behind the Supreme Court's power. Judicial review, the ability of the Court to declare an act of Congress or the executive or a state law unconstitutional, may seem on the surface to be "antidemocratic." A handful of lifetime appointees determine the meaning of the Constitution and whether a law passed by Congress and signed by the president is valid. In precise terms and using complex reasoning, Rostow defends the Supreme Court's use of judicial review as being the essence of the American democratic system. In his words, "The political proposition underlying the survival of the power is that there are some phases of American life which should be beyond the reach of any majority, save by constitutional amendment." Rostow's argument is based on what is meant by a democracy. To add a bit to Rostow's explanation, the United States is a "polity" in which the majority rules with protections guaranteed for individuals and minorities. The judiciary ensures that the minority is protected from "tyranny of the majority." Notice the title of this book of readings.

THE IDEA that judicial review is undemocratic is not an academic issue of political philosophy. Like most abstractions, it has far-reaching practical consequences. I suspect that for some judges it is the mainspring of decision, inducing them in many cases to uphold legislative and executive action which would otherwise have been condemned. Particularly in the multiple opinions of recent years, the Supreme Court's

self-searching often boils down to a debate within the bosoms of the Justices over the appropriateness of judicial review itself.

The attack on judicial review as undemocratic rests on the premise that the Constitution should be allowed to grow without a judicial check. The proponents of this view would have the Constitution mean what the President, the Congress, and the state legislatures say it means. . . .

It is a grave oversimplification to contend that no society can be democratic unless its legislature has sovereign powers. The social quality of democracy cannot be defined by so rigid a formula. Government and politics are after all the arms, not the end, of social life. The purpose of the Constitution is to assure the people a free and democratic society. The final aim of that society is as much freedom as possible for the individual human being. The Constitution provides society with a mechanism of government fully competent to its task, but by no means universal in its powers. The power to govern is parcelled out between the states and the nation and is further divided among the three main branches of all governmental units. By custom as well as constitutional practice, many vital aspects of community life are beyond the direct reach of government—for example, religion, the press, and, until recently at any rate, many phases of educational and cultural activity. The separation of powers under the Constitution serves the end of democracy in society by limiting the roles of the several branches of government and protecting the citizen, and the various parts of the state itself, against encroachments from any source. The root idea of the Constitution is that man can be free because the state is not.

The power of constitutional review, to be exercised by some part of the government, is implicit in the conception of a written constitution delegating limited powers. A written constitution would promote discord rather than order in society if there were no accepted authority to construe it, at the least in cases of conflicting action by different branches of government or of constitutionally unauthorized governmental action against individuals. The limitation and separation of powers, if they are to survive, require a procedure for independent mediation and construction to reconcile the inevitable disputes over the boundaries of constitutional power which arise in the process of government. . . .

So far as the American Constitution is concerned, there can be little real doubt that the courts were intended from the beginning to have the power they have exercised. The Federalist Papers are unequivocal; the Debates as clear as debates normally are. The power of judicial review was commonly exercised by the courts of the states, and the people were accustomed to judicial construction of the authority derived from colonial charters. Constitutional interpretation by the courts, Hamilton said, does not

> by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.

Hamilton's statement is sometimes criticized as a verbal legalism. But it has an advantage too. For much of the discussion has complicated the problem without clarifying it. Both judges and their critics have wrapped themselves so successfully in the difficulties of particular cases that they have been able to evade the ultimate issue posed in the Federalist Papers.

Whether another method of enforcing the Constitution could have been devised, the short answer is that no such method has developed. The argument over the constitutionality of judicial review has long since been settled by history. The power and duty of the Supreme Court to declare statutes or executive action unconstitutional in appropriate cases is part of the living Constitution. "The course of constitutional history," Mr. Justice Frankfurter recently remarked, has cast responsibilities upon the Supreme Court which it would be "stultification" for it to evade. The Court's power has been exercised differently at different times: sometimes with reckless and doctrinaire enthusiasm; sometimes with great deference to the status and responsibilities of other branches of the government; sometimes with a degree of weakness and timidity that comes close to the betrayal of trust. But the power exists, as an integral part of the process of American government. The Court has the duty of interpreting the Constitution in many of its most important aspects, and especially in those which concern the relations of the individual and the state. The political proposition underlying the survival of the power is that there are some phases of American life which should be beyond the reach of any majority, save by constitutional amendment. In Mr. Justice Jackson's phrase, "One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." Whether or not this was the intention of the Founding Fathers, the unwritten Constitution is unmistakable.

If one may use a personal definition of the crucial word, this way of policing the Constitution is not undemocratic. True, it employs appointed officials, to whom large powers are irrevocably delegated. But democracies

need not elect all the officers who exercise crucial authority in the name of the voters. Admirals and generals can win or lose wars in the exercise of their discretion. The independence of judges in the administration of justice has been the pride of communities which aspire to be free. Members of the Federal Reserve Board have the lawful power to plunge the country into depression or inflation. The list could readily be extended. Government by referendum or town meeting is not the only possible form of democracy. The task of democracy is not to have the people vote directly on every issue, but to assure their ultimate responsibility for the acts of their representatives, elected or appointed. For judges deciding ordinary litigation, the ultimate responsibility of the electorate has a special meaning. It is a responsibility for the quality of the judges and for the substance of their instructions, never a responsibility for their decisions in particular cases. It is hardly characteristic of law in democratic society to encourage bills of attainder, or to allow appeals from the courts in particular cases to legislatures or to mobs. Where the judges are carrying out the function of constitutional review, the final responsibility of the people is appropriately guaranteed by the provisions for amending the Constitution itself, and by the benign influence of time, which changes the personnel of courts. Given the possibility of constitutional amendment, there is nothing undemocratic in having responsible and independent judges act as important constitutional mediators. Within the narrow limits of their capacity to act, their great task is to help maintain a pluralist equilibrium in society. They can do much to keep it from being dominated by the states or the Federal Government, by Congress or the President, by the purse or the sword.

In the execution of this crucial but delicate function, constitutional review by the judiciary has an advantage thoroughly recognized in both theory and practice. The power of the courts, however final, can only be asserted in the course of litigation. Advisory opinions are forbidden, and reefs of self-limitation have grown up around the doctrine that the courts will determine constitutional questions only in cases of actual controversy, when no lesser ground of decision is available, and when the complaining party would be directly and personally injured by the assertion of the power deemed unconstitutional. Thus the check of judicial review upon the elected branches of government must be a mild one, limited not only by the detachment, integrity, and good sense of the Justices, but by the structural boundaries implicit in the fact that the power is entrusted to the courts. Judicial review is inherently adapted to preserving broad and flexible lines of constitutional growth, not to operating as a continuously active factor in legislative or executive decisions. . . .

Democracy is a slippery term. I shall make no effort at a formal definition here. . . . But it would be scholastic pedantry to define democracy in such a way as to deny the title of "democrat" to Jefferson, Madison, Lincoln, Brandeis, and others who have found the American constitutional system, including its tradition of judicial review, well adapted to the needs of a free society. As Mr. Justice Brandeis said,

> the doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of governmental powers among three departments, to save the people from autocracy.

It is error to insist that no society is democratic unless it has a government of unlimited powers, and that no government is democratic unless its legislature had unlimited powers. Constitutional review by an independent judiciary is a tool of proven use in the American quest for an open society of widely dispersed powers. In a vast country, of mixed population, with widely different regional problems, such an organization of society is the surest base for the hopes of democracy.

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DAVID O'BRIEN

From *Storm Center*

Professor David O'Brien's fine book on the Supreme Court touches on many landmark cases in constitutional law. Few are more important than Brown v. Board of Education of Topeka, Kansas. *Today's students of American government often take* Brown *for granted, since they've lived with the Court's ruling their whole lives; thus they may forget the dramatic events surrounding the 1954 decision. In this excerpt O'Brien revisits the first* Brown *case, as well as* Brown II, *exploring the delicate relationship between the Court and public opinion. He then goes back to President Franklin Roosevelt's infamous 1937 "court-packing" scheme to illustrate another aspect of the impact of public opinion on the judiciary. Unlike the citizenry's direct and immediate reaction to Congress and the president, the communication of views between the public and the judiciary is less easy to measure, O'Brien acknowledges. Yet the Supreme Court lies, as it should, at the heart of the process that resolves the nation's monumental political issues.*